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In the Supreme Court of the United States

OCTOBER TERM, 1982

T. H. BELL, SECRETARY OF EDUCATION, PETITIONER,

v.

STATE OF NEW JERSEY, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICI CURIAE OF THE STATES OF MARYLAND, DELAWARE, HAWAII, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MASSACHUSETTS, MISSISSIPPI, NEBRASKA, NEVADA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, VERMONT, VIRGINIA, WEST VIRGINIA, AND THE CALIFORNIA DEPARTMENT OF EDUCATION, THE NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, AND THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF RESPONDENTS

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The Amici Curiae, by their respective legal counsel, submit this brief in support of the positions taken by Respondents New Jersey and Pennsylvania and urge the Court to affirm the judgment of the United States Court of Appeals for the Third Circuit in *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981).[1]

[1] Letters of consent by all parties to the submission of this brief are being filed with the Clerk pursuant to Rule 36 of the Rules of this Court.

INTEREST OF AMICI CURIAE

Each of the Amici Curiae is acutely interested in the Court's disposition of this case.

Like Respondents New Jersey and Pennsylvania, all of the States joining in this brief have participated as grantees in the funding program provided by Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2701 *et seq.* (Supp. 1982) ("Title I"). Of these States, California, Hawaii, Illinois, Kentucky, Maryland, Mississippi, Nevada, New Mexico, Oklahoma, Oregon, Texas, Virginia, and West Virginia have been ordered by the Secretary of Education (the "Secretary") to repay Title I funds received and allegedly misspent before 1978.

None of these States has been charged with fraud or with diverting Title I funds to a use other than the education of its children. Their disputes with the Secretary arise from alleged mistakes made in implementing a new and complex federal program under an intricate set of rules and regulations, the terms of which were open to various interpretations.

Maryland's situation illustrates the manner in which the Secretary has attempted to exercise the power he seeks in this case against Title I grantees. The Secretary has ordered Maryland to refund $10,875,333 in Title I funds allegedly misspent during fiscal years 1975 through and including 1978. The focus of Maryland's dispute with the Secretary is the meaning of the terms "comparability" and "supplant" in the Title I regulations. *See* 34 C.F.R. Part 200. Maryland's appeal of the Secretary's order is currently pending before the Education Appeal Board of the Department of Education.

The National Association of State Boards of Education represents the State boards of education in 46 States and

five United States Territories in the boards' effort to promote quality education and strengthen the lay control of American public education.

The American Council on Education is a voluntary membership organization composed of 1,355 non-profit institutions of higher education from both the public and private sectors and 178 educational associations.

SUMMARY OF ARGUMENT

The judgment of the Third Circuit below should be affirmed because it is a correct application of the rule and reasoning of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) and other controlling legal principles. The Secretary has neither specific statutory authority nor a common law right to recoup through administrative proceedings Title I funds received and spent before October 1, 1978. The only statutory provision giving such authority was added to Title I by amendments effective on October 1, 1978, which, under *Pennhurst*, cannot be applied retroactively to funds received and spent prior to that effective date. The Secretary has no common law right, independent of statutory authority, administratively to recoup misspent Title I funds because Congress abrogated that right by establishing a comprehensive remedial scheme as part of Title I and because even if such a right existed it could only be exercised through an action in a court of competent jurisdiction.

Unless the Third Circuit's decision is affirmed, the States that accepted Title I funds before October 1, 1978 will be subject to a penalty that was not a part of the terms of the grant under which they agreed to participate in Title I. They may be forced to repay Title I funds out of their general treasuries, requiring them to increase taxes, incur additional debt, or eliminate services to their citizens to compensate for the loss of those funds. By

displacing a State's decisions about those matters, such a penalty would conflict with the principle of Federalism under which States must be free to function effectively and independently as coordinate elements in the Federal System. This is especially true in the field of public education, which has a long tradition in this country of being committed to the control of State and local authorities.

ARGUMENT

THE THIRD CIRCUIT'S DECISION SHOULD BE AFFIRMED BECAUSE IT IS A CORRECT APPLICATION OF *PENNHURST STATE SCHOOL v. HALDERMAN* AND OTHER CONTROLLING LEGAL PRINCIPLES.

In its decision below, *New Jersey v. Hufstedler*, 662 F.2d 208 (3d Cir. 1981), the Third Circuit correctly held that the Secretary lacked both statutory authority and a common law right administratively to recoup Title I funds allegedly misspent before 1978. Title I funds are available only to schools, attendance areas and children meeting very specific criteria set forth in the Title I regulations. The *Hufstedler* case arose when, after audits and subsequent administrative review, the Secretary determined that New Jersey and Pennsylvania had failed to meet those criteria with respect to certain Title I funds received and spent before 1978 and ordered those States to refund the misspent funds.

The Third Circuit ruled that the Secretary lacked specific statutory authority to order the refund because the only provision giving such authority, Section 185 of Title I, 20 U.S.C. § 2835 (Supp. 1982), was added to Title I by amendments that became effective on October 1, 1978. Relying on *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981), the Court concluded that those amendments could not be applied retroactively to funds received and spent prior to their effective date. 662 F.2d at 212-16. The

Court also held that the Secretary had no common law right independent of specific statutory authority to recoup the funds through administrative proceedings because such a right may only be exercised, assuming that it exists at all, through an action in a court of competent jurisdiction. *Id.* at 216-18.

Almost contemporaneously with the Third Circuit's decision in *Hufstedler,* the United States Court of Appeals for the Fourth Circuit, ignoring *Pennhurst,* ruled in a per curiam opinion, which the Court initially ordered not to be published,[2] that the Secretary had both statutory and common law authority to order, after administrative proceedings, West Virginia to refund Title I funds misspent before 1978. *West Virginia v. Secretary of Education,* 667 F.2d 417 (4th Cir. 1981).

It is essential to understand what this case is and is not about. The decisions of the Third and Fourth Circuits present this Court with the issue whether, in the absence of fraud, the Secretary has the authority in the administration of new and complex regulations to recoup Title I funds received and allegedly misspent before October 1, 1978 through administrative proceedings initiated years after the promulgation of the regulations and the expenditure of the funds.

This case does not concern Title I funds received and misspent after October 1, 1978 because Congress has specifically given the Secretary the power to recoup those funds through administrative proceedings.

However, the need for a clear ruling from this Court on the extent of the Secretary's power under the pre-1978

[2] *See West Virginia v. Secretary of Education,* No. 80-1704 (4th Cir. Oct. 15, 1981) (unpublished slip opinion). On December 23, 1981, the Court granted the Secretary's motion to publish the opinion, thus giving it precedential authority. *See* 4th Cir. R. 18.

version of Title I was underscored by Congress' enactment of the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, 95 Stat. 463 (1981), in which Congress returned to that approach by limiting the Secretary to remedies other than recoupment. *See* 20 U.S.C. §§ 3803, 3872 (Supp. 1982).

The myriad of other federal grant statutes discussed and alluded to in the Secretary's brief (Sec. Br. 2-5) should not affect the disposition of this case. Each of those statutes contains its own enforcement scheme established by Congress so as best to comport with the purpose and nature of the grant program involved.

It is also important to appreciate the power the Secretary is asking this Court to grant him. Although his brief contains references to his authority to "offset" (Sec. Br. 8, 13, 19, 20, 26), "recoup" (*id.* 13, 19, 20), and "withhold" (*id.* 14, 32) Title I funds, the Secretary is asserting nothing less than the power to order States to repay Title I funds out of their general treasuries without first having to file suit in court (*See* Sec. Pet. 17; Sec. Br. 20).

The exercise of that power would have the gravest impact on a State's sovereignty. Forcing a State to increase taxes, incur additional debt, or eliminate services to its citizens to satisfy such a refund order would displace a State's decisions about those matters and thereby impair its ability to function effectively and independently as a "coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities v. Usery*, 426 U.S. 833, 849 (1976). This is especially true in the field of public education, which has a long tradition in this Nation of being "committed to the control of state and local authorities." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

This is not to say that Congress cannot give the Secretary such power. However, because of the broad and

intrusive nature of that power this Court should not find that Congress intended to grant it without the clearest expression of Congressional intention to do so. *See Pennhurst State School v. Halderman*, 451 U.S. 1, 16-17 (1981). The post-1978 version of Title I contains such an expression in Section 185. The pre-1978 version of Title I contains absolutely no evidence of such an intention.

The exercise of the power the Secretary seeks in this case would also harm the intended beneficiaries of Title I — economically disadvantaged schoolchildren. If he were to exercise that power by forcing a State to repay funds it can be expected that, given the limited resources available to a State and the numerous demands made on those resources, the ultimate source for the funds would be State or federal funds for which there is no accountability to the federal government that would otherwise be directed to educational programs for poor schoolchildren. If the Secretary were to exercise that power by offsetting the amount owed against current Title I funds he would be penalizing the disadvantaged schoolchildren of *today* for the mistakes made by school administrators *over five years ago.*

The federal government's role in the disputes that generated this case must also be noted. The federal government was the lead partner in Title I and shares in any culpability for errors in its implementation. It wrote the Title I regulations and its agents were charged with the responsibility to conduct audits to assure that the States were spending their Title I funds in compliance with those regulations. Had the federal government discovered the alleged errors at the time they were being made, the States could have taken corrective action *at that time* without suffering any, or at the worst any significant, disruption of their efforts to carry out the goals of Title I.

I.

THE SECRETARY HAS NO STATUTORY AUTHORITY TO ORDER STATES TO REFUND TITLE I FUNDS RECEIVED AND SPENT BEFORE OCTOBER 1, 1978.

Pennhurst State School v. Halderman, 451 U.S. 1 (1981) is crucial to a proper analysis of the Secretary's authority. This Court held in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-81 (1976 & Supp. III 1979), which establishes a voluntary grant program under which participating States receive federal funds to assist in caring for mentally retarded persons, did not impose an affirmative obligation on the States to provide persons under care with "appropriate treatment" in the "least restrictive" environment. 451 U.S. at 18-19. The Court reasoned that the section of the Act that supposedly created such an obligation did not unambiguously state that compliance with its terms was a condition of receiving federal funds. *Id.* at 18-27.

The principle on which the Court's decision rested is that the States may not be forced to comply with conditions to grant programs enacted under Congress' spending power[3] unless those conditions are clearly and unambiguously set forth in the statute authorizing the grant when the States decide to participate in the grant program by accepting funds. The Court explained that

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly

[3] Counsel for the Secretary conceded at the oral argument before the Third Circuit that Title I was, like the statute at issue in *Pennhurst*, enacted under the spending power. *See* 662 F.2d at 214 n.15.

> accepts the terms of the "contract." See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598 (1937); *Harris v. McRae*, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Cf. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. at 17 (footnote omitted).

As the Third Circuit correctly held, the principle stated in *Pennhurst* impels the conclusion that the Secretary lacks specific statutory authority to order the repayment of Title I funds received and spent before October 1, 1978. The only express authorization to recoup was provided in amendments to Title I that became effective on that date, amendments that, under *Pennhurst*, cannot be applied retroactively to funds received and spent before their effective date.

Section 185 of Title I, 20 U.S.C. § 2835 (Supp. 1982), added by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143, 2190-91 (1978), grants the Secretary statutory authority to order a refund of misspent Title I funds. That Section provides that when Title I audits disclose a misapplication of grant funds, the Secretary shall take steps to "assure timely and appropriate resolution of audit findings and recommendations," including a repayment of funds "finally determined . . . to have been misspent or misapplied." By the terms of the 1978 amendments, Section 185 was to "take effect October 1, 1978." 92 Stat. at 2380.

Section 185 substantially changed Title I's enforcement scheme. Before Section 185 was enacted, the Secretary had no statutory authority to order refunds of misspent Title I funds. Instead, he could enforce the proper expenditure of Title I funds only through the withholding of future Title I funds or the disapproval of applications for Title I funds. *See* 20 U.S.C. §§ 241f, 241j (1974) (current version at 20 U.S.C. §§ 2832, 2836 [Supp. 1982]). Each of these remedies would affect only the State's receipt of future Title I funds; neither gave the Secretary the power to require repayment of misspent funds.

The evolution of Title I's enforcement scheme reflects Congress' recognition of the principle so eloquently described by Justice Black, writing for the Court in *Younger v. Harris*, 401 U.S. 37, 44-45 (1971), as "Our Federalism." Under that principle the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests, [must] always endeavor[ ] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* The remedies that were part of Title I as it was initially enacted caused little or no interference with a State's governmental activities.

The pre-1978 remedies represented a reasonable balance between State and federal interests in providing Title I educational services. If a State was found by audit to have used Title I funds for purposes other than those specifically intended by Congress, the Secretary could withhold or disapprove future Title I funds for the State until he was fully satisfied that they would be spent for the specific purposes for which Congress intended them. In this manner, the ultimate purpose of Congress to provide supplemental educational services to disadvantaged schoolchildren would be achieved without intruding into the State's sovereignty and without depriving the State of supplemental funds for disadvantaged schoolchildren where proper expenditure was assured.

In 1978, however, Congress, believing that a stronger remedy was necessary, gave the Secretary the power to force States to repay misspent Title I funds out of their general treasuries by adding Section 185, a far broader and more intrusive power than that previously given him. Under *Pennhurst,* this new remedy may only be exercised against States that voluntarily and knowingly assumed the risk of its imposition on them by accepting Title I funds after October 1, 1978.

As the Secretary recognized (Sec. Br. 13, 17), the relationship between the federal government and States participating as Title I grantees is "much in the nature of a contract." *Pennhurst State School v. Halderman,* 451 U.S. 1, 17 (1981). The terms of the contract were materially altered by the 1978 amendments. Before October 1, 1978, when Section 185 became effective, that contract provided that the States would receive Title I funds so long as those funds were spent in compliance with Title I's requirements; if the funds were misspent, the States would not receive any further Title I funds until compliance was assured. The contract created by the 1978 amendments to Title I provides that if Title I funds are misspent, the States must repay those funds *out of their general treasuries. See* 662 F.2d at 214.

Under the pre-1978 contract, a State's decision to participate in Title I and accept funds was based only on the risk that if it misspent those funds, the Secretary would turn off the Title I tap and the State would have to carry on, as before, with the education of its children without the aid of Title I funds or until it had provided adequate assurance that irregularities had been corrected and further Title I funds would be properly expended strictly in compliance with the statutory requirements. Under the post-1978 contract, the risk of accepting Title I funds is quite different. If a State accepts and misspends

those funds it may be forced to repay them out of its general treasury, requiring the State to increase taxes, incur additional debt, or eliminate services to its citizens to compensate for the loss of those funds.

Thus, the Secretary's assertion that the 1978 amendments to Title I did not "impose new substantive obligations on" the States (Sec. Br. 39) is simply untrue.

As the Third Circuit correctly concluded, a State that entered the pre-1978 Title I contract with the federal government and received and spent Title I funds pursuant to that contract cannot, under *Pennhurst,* be forced to bear the additional burden imposed by the post-1978 contract created by Section 185. *See* 662 F.2d at 214. Paraphrasing *Pennhurst,* 451 U.S. at 17, States can only be held to the terms of the Title I contract that they "voluntarily and knowingly" accepted when they entered that contract; they would be unable to "exercise their choice [whether to participate in Title I] knowingly, cognizant of the consequences of their participation," if they were to be forced to accept conditions and penalties added years after that choice was made.

A fundamental principle of statutory construction supports the Third Circuit's conclusion that Section 185 should not be applied retroactively. In *Greene v. United States,* 376 U.S. 149, 160 (1964), this Court explained that principle:

> [T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retrospective operation will not be given to a statute which interferes with antecedent rights . . . *unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."*

(quoting *Union Pacific Railroad v. Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)) (emphasis supplied). *See*

also Brewster v. Gage, 280 U.S. 327, 337 (1930) ("Ordinarily, statutes establish rules for the future, and they will not be applied retrospectively unless that purpose plainly appears."); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928) ("Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."); *see generally* 2 Sutherland, *Statutory Construction*, § 41.04, at 252-54 (C. Sands ed. 1973).

The rule stated in these cases proscribes the retroactive application of Section 185 in the absence of any explicit and unequivocal evidence that Congress intended it so to apply.

There is absolutely nothing in Section 185 or its legislative history indicating that Congress intended it to apply retroactively to Title I funds received and spent before its effective date. *See* 1978 U.S. Code Cong. & Ad. News 4971-5226. Section 185 was added to Title I by the Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2143-2380 (1978). Section 1530 of the Amendments provides that Section 185 "shall take effect October 1, 1978." *Id.* at 2380.

The Secretary argues that reliance on Section 185 does not involve an unfair retroactive application of the law, citing the principle that federal courts and administrative agencies must apply the law in existence at the time of decision, including any change that became effective during the course of the proceedings. However, that principle only applies when the statutory change at issue is *procedural* in nature and does not affect a *substantive* right of a party. In *Hallowell v. Commons*, 239 U.S. 506, 508 (1916), for example, this Court held applicable to a suit pending in federal court to determine Indian heirship a statute vesting the Secretary of the Interior with

jurisdiction of such controversies because the statute enacted after the suit was begun "takes away no substantive right, but simply changes the tribunal that is to hear the case." *See also Bowles v. Strickland,* 151 F.2d 419, 420 (5th Cir. 1945) (amendment to the Emergency Price Control Act eliminating the requirement that the Secretary of Agriculture approve the filing of lawsuits applied to pending litigation because the "amendment did not affect substantive rights, but related only to the procedural machinery provided to enforce such rights. . . ."); *United States v. Vanella,* 619 F.2d 384, 385-86 (5th Cir. 1980) (1979 amendment to the Speedy Trial Act suspending imposition of the dismissal penalty applied to pending case because it was only a "procedural" change in the statute).

As discussed above, the addition of Section 185 to Title I made a substantive, rather than a procedural, revision to Title I. It substantially altered Title I's enforcement scheme by adding a new penalty for noncompliance — refunding of misspent funds out of a State's general treasury — and thus materially changed the risk undertaken by States that decided to participate in Title I.

Moreover, even if the change made to Title I by Section 185 is characterized as procedural, the retroactive application of that Section is proscribed by *Bradley v. Richmond School Board,* 416 U.S. 696, 711-21 (1974), in which this Court set forth those circumstances under which a statute may be retroactively applied, because it would result in a "manifest injustice". A retroactive application of Section 185 would unfairly impose on the States that accepted Title I funds before 1978 an "increased burden" in the form of a penalty that was not a part of the contract under which they agreed to participate in Title I, a "new and unanticipated obligation [ ]," *id.* at 720-21. Retroactive application of that penalty would also unjustly harm the intended beneficiaries of Title I — disadvantaged school-

children — because States may be less likely to participate in Title I in the future if they cannot know for certain the risks they undertake and the penalties to which they subject themselves when they decide to accept Title I funds.

II.

THE SECRETARY HAS NO COMMON LAW RIGHT TO RECOUP MISSPENT TITLE I FUNDS THROUGH ADMINISTRATIVE PROCEEDINGS.

The Secretary also invokes a common law right, independent of specific statutory authority, of the federal government to recover funds illegally paid as an additional source for his authority to order refunds of misspent pre-1978 Title I funds after administrative proceedings.

The Court below did not determine whether such a right existed because, the Court reasoned, even if it did it was not available to support the Secretary's action in this case. The Court correctly held that the Secretary had no such right in this case because such a right may only be exercised through an action in a court of competent jurisdiction and not through administrative proceedings. 662 F.2d at 216-18.

To affirm the judgment of the Third Circuit, this Court need only agree with the Third Circuit's ruling that whatever common law right of recoupment the Secretary has must be exercised through an action in court. Because the Secretary has not filed such an action, the broader question whether he has such a right in that context is not at issue. *See* 662 F.2d at 219 (Higginbotham, J., concurring).

The Secretary has no common law right to recoup misspent pre-1978 Title I funds through administrative proceedings. In *Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger*, 517 F.2d 329 (5th Cir. 1975), *cert.*

denied, 425 U.S. 935 (1976), the principal case on which the Secretary relied below, the Fifth Circuit only found such a right to exist because Congress had recognized that right and made specific reference to recoupment as a remedy in the statute involved. As the Court explained: "We think that Congress' intent when it enacted the Medicare Act in 1965 was not to limit the common law right. Provisions [in the Act] . . . show that Congress' understanding in 1972 when it amended the law was that the common law right was intact and expected to be utilized. . . . " 517 F.2d at 338.

In contrast to the Medicare statute, the pre-1978 version of Title I did not contemplate any common law right of recoupment on the Secretary's part. It provided a comprehensive remedial scheme, including withholding of funds and disapproval of applications, without reference to or need for a power of recoupment. *See* 20 U.S.C. §§ 241f, 241j (1974) (current version at 20 U.S.C. §§ 2832, 2836 [Supp. 1982]).

By providing that remedial scheme, Congress abrogated whatever common law causes of action the Secretary may have had to redress noncompliance with Title I. It is well established that where a legislative body provides for liability coupled with a special statutory remedy such as that contained in Title I, "that remedy, and that alone, must be employed." *Pollard v. Bailey*, 87 U.S. (20 Wall.) 520, 527 (1874). *See also National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("[W]hen legislation expressly provides a particular remedy . . . , courts should not expand the coverage of the statute to subsume other remedies."); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.").

Where Congress has expressly established a scheme of remedial sanctions courts have refused to infer additional sanctions, particularly where, as here, such sanctions would undermine the principle of Federalism. In *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973), for example, the Second Circuit refused to require New York State to correct the misspending of federal welfare funds by making retroactive payments to welfare recipients who had been underpaid by the State because "the only remedy [Congress] expressly contemplated was a prospective cut-off of [Federal] funds." *Id.* at 235. The Court explained:

> Congress has given no indication that it deems retroactive payments necessary to protect its interest, since the only remedy it expressly contemplated was a prospective cut-off of funds.
>
> Moreover, we cannot ignore the realities of the situation. The funds which were misspent are, as a practical matter, irretrievable. It would be unthinkable to order welfare recipients who received federal money under an illegal state program to return their checks. The reality is that the only means of redressing the harm to the federal treasury is to order the offending state to achieve *ex post facto* compliance through additional expenditure of *its* funds.
>
> That reality, however, invokes significant countervailing policies, namely, those behind the scheme of cooperative federalism alluded to earlier. Congress was clearly sensitive to the potential for serious strain in the federal structure inherent in a grant program of great magnitude and complexity. . . . Absent *explicit* directions from Congress to the contrary, we do not think that the federal interest in retroactively correcting the misuse of federal funds — the only federal policy applicable to this case — can by itself justify the significant increase in federal-state tensions which would result from a court order requiring the state to expend its funds against its will.

Id. (emphasis supplied).

The Secretary cites the Federal Claims Collection Act, 31 U.S.C. §§ 951-953 (1976), as "evidence of congressional belief in the existence of" the government's common law right of recoupment (Sec. Br. 24). The Amici concede that such a right exists; what is at issue is whether that right is available to support the Secretary's action in this case in the context of the Title I statute. The Secretary asserts that it is and the Third Circuit held and the Amici contend that it is not. The Federal Claims Collection Act adds nothing to the resolution of that dispute.

If Congress had not abrogated the Secretary's common law right of recoupment with the enactment of Title I's pre-1978 enforcement scheme, why did it in 1978 enact a specific statutory provision, Section 185, authorizing the recoupment remedy? If the Secretary already possessed such a remedy under the common law, Congress' addition of Section 185 to Title I was an act of complete redundancy. As Justice Douglas, writing for this Court in *Singer v. United States*, 323 U.S. 338, 344 (1945), explained, such an act cannot be attributed to Congress without "a clear legislative purpose" that would be served by that act. The Amici submit that no such purpose exists here.

Whatever common law right to recoupment the Secretary possesses must be exercised in a court of competent jurisdiction. Only then can the States be assured of the right to press their arguments concerning the merits of the audit in a judicial forum and the opportunity to have the facts supporting the refund claim evaluated in accordance with the rules of evidence and procedure.

CONCLUSION

The judgment of the Third Circuit should be affirmed because it is a correct application of the rule and reasoning

of *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981) and other controlling legal principles.

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